Supreme Court, U.S.
FILED

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No. ___

IN THE

Supreme Court of the United States

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners* seek certiorari review on two questions:

1) In light of the vital public interest in preserving confidence in an impartial judiciary, does the Petition Clause of the First Amendment to the United States Constitution preclude a court from sanctioning a party moving to vacate one of its decisions based upon a claim of judicial partiality or the appearance thereof without first determining that the motion was objectively meritless?

2) Before a state court of last resort can sanction an attorney for filing a motion in that court in bad faith and for an improper purpose, does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that court to afford the accused attorney an opportunity to respond and be heard?

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* With respect to the first question presented, "Petitioners" include attorney Edward R. Garvey and the law firm of Garvey & Stoddard, S.C., as well as their clients, Warner Jackson, Carl Gobel, Father Thomas Mueller and Wendell Harris. With respect to the second question presented, "Petitioners" include only attorney Garvey and the law firm; because the court reversed the sanctions order against their clients, those individuals do not join in the petition on the second question presented.

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the following parties are petitioners in this proceeding:

Garvey & Stoddard, S.C.
Wendell Harris
Carl A. Gobel
Warner Jackson
Father Thomas J. Mueller

In addition to the parties stated in the caption, the following parties are respondents in this proceeding:

John T. Benson, Superintendent of Public Instruction
Department of Public Instruction
James E. Doyle
Marquelle Miller
Cynthia Miller
Angela Gray
Zachery Gray
Shon Richardson
George Richardson
Latrisha Henry
Faye Henry
Reigne Barrett
Valerie Barrett
Candice Williams
Senton Williams
Clintrai Giles
Sharon Giles

CORPORATE DISCLOSURE STATEMENT

Neither petitioner has a parent corporation or issues stock; and, thus, no publicly held corporation owns 10 percent or more of petitioners' stock.

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Warner Jackson, Carl Gobel, Father Thomas Mueller, Wendell Harris and attorney Edward R. Garvey and the law firm of Garvey & Stoddard, S.C. (hereinafter "Petitioners"), respectfully petition for a writ of certiorari to review the July 9, 2002 order and February 19, 2002 opinion and order of the Wisconsin Supreme Court.

OPINIONS BELOW

The original opinion of the Wisconsin Supreme Court (App. 1a-13a) granting sanctions was entered on February 19, 2002, and is published at 2002 WI 14, 249 Wis. 2d 681, 639 N.W.2d 545. The order denying Petitioners' motion for reconsideration of that decision (App. 14a-26a) was entered on July 9, 2002, and is published at 2002 WI 90, 647 N.W.2d 815.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) as the questions presented in this case involve the right to petition and the right to due process of law provided under the First and Fourteenth Amendments to the United States Constitution respectively.

STATUTES INVOLVED

This case involves the interpretation and application of the First and Fourteenth Amendments, which provide in relevant part:

First Amendment

> Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people . . . to petition the Government for a redress of grievances.

Fourteenth Amendment

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . . .

INTRODUCTION

On January 8, 2002, Petitioners brought a Motion to Vacate the Wisconsin Supreme Court's "school choice" decision (*Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (Wis. 1998), *cert. denied sub nom. Gilbert v. Moore*, 525 U.S. 997 (1998) ("*Jackson I*")) on the grounds that the decision was void because one of the justices who had participated, the Honorable Jon P. Wilcox, should have recused himself. The Motion to Vacate was based on evidence from an investigation by the Wisconsin Elections Board, which established that during the election campaign to the Wisconsin Supreme Court immediately preceding *Jackson I*, Justice Wilcox's campaign had received illegal campaign contributions from pro "school choice" groups.

In a decision dated February 19, 2002 (four justices constituting the majority, two justices (including Justice Wilcox) not participating, and the Chief Justice dissenting (without opinion, on the sanctions order alone)), the Wisconsin Supreme Court denied the Motion to Vacate and, in part II of its decision, sanctioned Petitioners for bringing the motion, awarding the State of Wisconsin its attorney's fees and costs. *Jackson*, 249 Wis. 2d at 686, 697, 639 N.W.2d at 547, 553 ("*Jackson II*"). Although the court did not address the substance of Petitioners' challenge,[1] it nevertheless concluded

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[1] In its February 19, 2002 decision, the Wisconsin Supreme Court relied on *City of Edgerton v. Gen. Cas. Co.*, 190 Wis. 2d 510, 527 N.W.2d 305 (Wis. 1995), to the effect that the original plaintiffs had waived any challenge to the impartiality of Justice Wilcox. *Jackson II*, 249 Wis. 2d at 692-94, 639 N.W.2d at 550-51. That rationale was directly challenged by Petitioners in their Motion for Reconsideration on the grounds that in *City of Edgerton*, the justice whose impartiality was at issue gave express notice to the lawyers and their clients and invited them to make a challenge prior to her participation in the case. No such invitation was made by Justice Wilcox in *Jackson I*. Moreover, the original plaintiffs in *Jackson I* lacked the facts later uncovered in the Elections Board investigation at the time of the original argument in *Jackson I*. In any

that the motion was "frivolous." The court sanctioned Petitioners because of what it characterized as "inordinate delay" in filing the motion and because it found the Petitioners had filed the motion in bad faith, for improper purpose. The "improper purpose" attributed to Petitioners was inferred from what the court deemed a "tardy" attempt to cast doubt upon the *Jackson I* decision just prior to this Court's consideration of *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002).

By motion dated March 11, 2002, Petitioners sought rehearing of the sanctions order on the grounds, *inter alia*, that the court's decision violated their First Amendment right to petition and their Fourteenth Amendment right to due process of law. The Motion asked the court to withdraw its sanctions order or, in the alternative, remand the case to the circuit court to hear and make findings of fact with respect to the "inference" of bad faith and improper purpose that the court had drawn against Petitioners.

In an order dated July 9, 2002, signed by three justices, with the Chief Justice dissenting and the remaining three justices not participating, the Wisconsin Supreme Court denied the Motion to Reconsider as to Petitioners Edward R. Garvey and the law firm of Garvey & Stoddard, S.C.[2] *See Jackson*, 647 N.W.2d at 816-17 (Wis. 2002) ("*Jackson III*"). Chief Justice Shirley S. Abrahamson issued a strong dissent which criticized both the substance of the sanctions order and

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event, the Chief Justice in her dissent disposed of the court's rationale: "That the petitioners' motion was denied because it was untimely is not the same as a finding that there was no reasonable basis in law or equity to bring the motion." *Jackson*, 2002 WI 90, 647 N.W.2d 815, 819 (Wis. 2000).

[2] The court granted an unopposed motion to modify the sanctions order to remove Warner Jackson, Carl Gobel, Father Thomas Mueller and Wendell Harris.

the procedure followed by the court. *First*, she noted that the court had made no determination on the merits of Petitioners' challenge:

> This court never decided the merits of the challenge in the present case, that is, the court never decided whether Justice Wilcox erred in participating in *Jackson v. Benson.* That the [Petitioners'] motion was denied because it was untimely is not the same as a finding that there was no reasonable basis in law or equity to bring the motion.

Second, she opined that the court's decision lacked any basis for sanctioning Petitioners at all, much less to infer "bad faith" or improper purpose to them:

> Where are this court's findings about the frivolous claim if the court is imposing sanctions under Wis. Stat. § 802.05(1)(a) ? There are none. Where did this court find, as it is required to do, that the attorneys did not make the determinations required under § 802.05(1)(a) that "the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"? The court made no such finding. The court merely concluded that "the only reasonable inference" is that the motion was for "improper purposes."

Wisconsin's Chief Justice concluded as follows:

> In sum, this court's decision declaring the motion frivolous and imposing sanctions is erroneous on its face as a matter of law. *This court has failed to follow the law.* It did not make the requisite findings under either Wis. Stat. § 809.25(3)(c) or § 802.05(1)(a). *This court is not above the law.* Therefore, the court should vacate Part II of its February 19, 2002, decision.

Jackson, 2002 WI 90, 647 N.W.2d at 818-21 (emphases added).

For reasons fully explicated in the Chief Justice's dissent, the Wisconsin Supreme Court's sanctions order violated Petitioners' First Amendment rights to petition as well as their Fourteenth Amendment rights to Due Process of Law.

Most troubling is the context in which the sanctions order was issued. Petitioners were sanctioned for bringing a challenge to the Wisconsin Supreme Court's impartiality in deciding the *Jackson* "school choice" case. The challenge followed admissions of campaign finance law violations by Justice Wilcox's campaign manager and the agent for a group comprised of proponents of a particular outcome in the as-yet undecided *Jackson I* case—as well as a concession of responsibility by Justice Wilcox himself. By sanctioning Petitioners without first addressing whether there was any objective merit to their motion, the court violated Petitioners' First Amendment right to petition and sent a chilling message to anyone considering a future challenge to the court's partiality. It also sent a message to any lawyer who in the future might be asked to consider such a challenge.

In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), this Court recognized the inherent tensions involved when a judge is confronted with an attack on his or her participation in a case. Despite the nature of the attack—and in *Mayberry* there was a particularly egregious set of personal attacks—this Court made clear that particular care must be taken to protect the rights to Due Process of the litigant making the attack. In this context, the Court quoted with approval from the opinion of Chief Justice Taft in *Cooke v. United States*, 267 U.S. 517, 539 (1925) (quoted in part, emphasis added):

> The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. *This rule of caution*

> *is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. . . .*

The Court concluded that "[w]hether the trial be federal or state, the concern is with the fair administration of justice." *Mayberry*, 400 U.S. at 465.

This Court has recently "freed up" state judicial candidates from restraints on campaign speech. *See Republican Party v. White*, 122 S. Ct. 2528 (2002). The separate opinions in the *White* case, however, make clear that the Court did not intend to diminish or qualify the important public interest in maintaining the impartiality in fact as well as the appearance of impartiality of an elected judiciary. This point was emphasized in the concurring opinion of Justice Kennedy:

> Nothing in the Court's opinion should be read to cast doubt on the vital importance of th[e] state interest [in judicial integrity]. Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Id. at 2544 (Kennedy, J., concurring).

This Court's recent decision in *White* underscores the need to avoid chilling petitions which challenge judicial partiality, particularly where, as here, the court is an elected body.[3]

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[3] As ABA President Alfred P. Carlton Jr. recently stated: "The Supreme Court has thrown the fat in the fire[.] . . . If judges indeed have First Amendment rights to fully participate in partisan elections, then they're going to act like partisans. They're going to have to because the system is going to force them." Terry Carter, *Boosting the Bench*, 88 ABA. Oct. 2002, at 34.

Justice O'Connor's concerns, for example, resonate in the context of the facts of this case: "Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *Id.* at 2543 (O'Connor, J. concurring). As Justice Kennedy stated, judicial impartiality is a vital "state interest of the highest order." *Id.* at 2544 (Kennedy, J. concurring). Proper public concern about judicial bias (*e.g.*, resulting from campaign "speech" or "announcements" or "pledges" or contributions) would only be exacerbated by a perception that any challenge claiming judicial bias would (or could) be met with sanctions, regardless of its merits.

The vital issue of judicial integrity was the very issue which Petitioners brought directly to the Wisconsin Supreme Court. Theirs was a legitimate and serious challenge. The Wisconsin Supreme Court's summary and punitive rejection of Petitioners' challenge appeared to shun, or at least ignore, a fundamental challenge to the legitimacy of one of its most controversial decisions. In the process, Petitioners' First Amendment right to petition and Fourteenth Amendment right to Due Process were trampled.

STATEMENT OF THE CASE

A. Facts Relating To Petitioners

Petitioners are described as follows: Warner Jackson is an adult resident of Milwaukee whose occupation is a customer service manager; Carl Gobel is an adult resident of Milwaukee who is a retired school administrator; Wendell Harris is an adult resident of Milwaukee whose occupation is an operator of a transit bus service; and Father Thomas Mueller is an adult resident of Milwaukee whose occupation is an Orthodox Priest. These individuals were amongst the group of plaintiffs who challenged the constitutionality of Wisconsin's "Milwaukee Parent Choice" legislation in the *Jackson* case.

Petitioner Edward Garvey has been an attorney in Wisconsin since 1969. During this time, he has been politically active. For example, he was the Democratic Party nominee for the United States Senate in 1986 and for Governor in 1998. He previously served as the Deputy Attorney General for the State of Wisconsin. Petitioner Garvey, together with Glenn Stoddard, founded the law firm of Garvey & Stoddard, S.C. in 1998. Garvey & Stoddard has one office in Madison, Wisconsin with seven attorneys whose practice concentrates in civil rights, environmental and public interest law. Petitioner Garvey has also been active on the issue of campaign finance reform, having created the Heffernan Commission, named after and chaired by former Wisconsin Chief Justice Nathan Heffernan, to examine and find solutions for the corrosive effect which money and special interest groups have had on Wisconsin's elected judiciary and other branches of government.

B. Facts Relating To The Decision To Bring The Motion To Vacate *Jackson v. Benson*, And Its Timing

On March 4, 1998 the Wisconsin Supreme Court upheld the constitutionality of Wisconsin's "Milwaukee Parental Choice Program" or "school choice" program. *See Jackson I*, 218 Wis. 2d 835, 578 N.W.2d 602. Four justices of the court joined in affirming the validity of Wisconsin's program, with one justice not participating and two justices dissenting. Justice Wilcox joined in the majority opinion.

Justice Wilcox's participation in *Jackson I* later served as the reason for Petitioners' Motion to Vacate that decision. Specifically, the Motion to Vacate was based on facts coming out of an investigation of Justice Wilcox's reelection campaign—and admissions relating thereto—which raised serious questions about the propriety of his participation in *Jackson I*.

1. Justice Wilcox's reelection to the Wisconsin Supreme Court: The election eve "get out the vote" campaign and subsequent investigation thereof by the Wisconsin Elections Board

In April 1997, Justice Wilcox defeated attorney Walter Kelley in a statewide election to retain his seat on the Wisconsin Supreme Court. *Jackson II*, 249 Wis. 2d at 687, 639 N.W.2d at 548. Subsequent to that election, questions arose concerning the identity of persons and entities who funded an election-eve "get out the vote" mailing of some 345,000 postcards and an intensive last-minute telephone campaign costing approximately $200,000 (without regard to the value of "in kind" time) in support of Justice Wilcox's reelection. Compl. ¶ 11 (App. 60a-61a). On June 16, 1997, the Wisconsin Coalition for Voter Participation ("WCVP") was identified in a newspaper article as the group that coordinated the postcard mailing. On July 30, 1997, the Wisconsin Elections Board commenced an investigation to determine, *inter alia*, who had contributed the funds that the WCVP used in coordinating the last-minute campaign and whether or not the Wilcox campaign itself was directly or indirectly involved. *Jackson II* at 688, 639 N.W.2d at 548.

"School choice" was one of the important issues in the Wilcox-Kelly race for the Supreme Court. Prior to the election, a Dane County Circuit Court judge had declared that Milwaukee's "school choice" program was unconstitutional and, in light of the Wisconsin Supreme Court's three-to-three decision in the prior "school choice" case,[4] the trial court's decision was likely to ultimately find its way to the Wisconsin Supreme Court after the election. And so it did.

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[4] Wisconsin's "school choice" program had previously come before the Wisconsin Supreme Court in 1996. The court split three-to-three over the constitutionality of the program, with Justice Wilcox voting to uphold it. *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 546 N.W.2d 140 (Wis. 1996).

On August 22, 1997, the Wisconsin Court of Appeals affirmed the lower court order finding that Wisconsin's "school choice" program was unconstitutional. *Id.* The Wisconsin Supreme Court then granted the state's petition for review in October 1997.

In December 1997, the Elections Board commenced an administrative investigation of the WCVP, the Justice Wilcox for Justice Campaign ("JWJC") and its campaign manager, Mark Block, and others, for possible violations of Wisconsin elections law. The complaint alleged, *inter alia*, that the JWJC had received indirect campaign contributions from individuals and entities in violation of Wis. Stat. §§ 11.38(1)(a)1 and (b).[5] *See* Compl. ¶ 14 (App. 61a).

2. The stay of the Elections Board's investigation: December, 1997 through November, 1999

The Elections Board was unable to complete its investigation prior to oral argument in *Jackson I*, however, because in December 1997 the WCVP, together with the JWJC and Mark Block, filed a lawsuit seeking to halt the investigation. *Jackson II*, 249 Wis. 2d at 688-89, 639 N.W.2d at 548. Although this lawsuit was dismissed on summary judgment, the Wisconsin Court of Appeals granted a stay of the investigation pending appeal of the dismissal. *WCVP v. Wis. Elections Bd.*, 231 Wis. 2d 670, 673, 605 N.W.2d 654, 656-57 (Ct. App. 1999). Thus, despite having been dismissed at the trial court level, the lawsuit effectively suspended the investigation during the entire time that the Wisconsin Supreme Court was considering *Jackson I*.

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[5] Section 11.38(1)(a)1 of the Wisconsin Statutes precludes any "foreign or domestic corporation or association" from making "any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum." Section 11.38(1)(b) precludes any candidate from accepting any such contributions.

3. Oral argument in *Jackson* I: March 4, 1998

The Wisconsin Supreme Court heard oral argument in *Jackson I* on March 4, 1998, and issued its decision on June 10, 1998. The decision was four-to-two in favor of the constitutionality of the school choice program. Justice Wilcox participated and voted with the majority. On November 9, 1998, this Court denied certiorari review (*sub nom. Gilbert v. Moore*, 525 U.S. 997 (1998)).

4. The outcome of the Elections Board's civil case: Mark Block's admissions and Justice Wilcox's March, 2001 "concession"

In November 1999, the Wisconsin Court of Appeals allowed the Elections Board investigation to proceed by affirming a circuit court dismissal of the WCVP's lawsuit. *Wis. Elections Bd.*, 231 Wis. 2d at 687, 605 N.W.2d at 662. Thereafter, the investigation continued. However, on March 22, 2000, the Elections Board unanimously adopted the following motion, which appeared to vindicate Justice Wilcox:

> Motion: To express the sense of the elections board that Jon Wilcox did nothing illegal and was not personally responsible for any illegal activities of his campaign for the office of Justice of the Supreme Court . . . .

Jackson II, 249 Wis. 2d at 689, 639 N.W.2d at 549. Notwithstanding, on March 24, 2000, the Elections Board filed a civil lawsuit against Mark Block, the WCVP, the JWJC (and others), alleging various violations of state election laws. The Elections Board's complaint alleged, in part, as follows:

> 11. Prior to the April 1, 1997 Wisconsin Supreme Court Election, in furtherance of their GOTV ["get out the vote"] project, . . . the WCVP made disbursements and incurred obligations of approximately $200,000 on mailings and telephone calls to targeted voters. This GOTV effort included mailing approximately 345,000

postcards on or about March 27, 1997, and making approximately 250,000 telephone calls to postcard recipients or other targeted voters between March 27 and April 1, 1997. WCVP raised $200,500 from 12 contributors to the GOTV effort.

12. The purpose of WCVP's GOTV effort was to influence the election of Wisconsin Supreme Court Justice on April 1, 1997, by supporting the election of Justice Wilcox, and as such the postcard mailings and telephone calls referred to in the preceding paragraph constituted "contributions" within the meaning of Wis. Stat. § 11.01(6)(a).

Compl. ¶¶ 11-12 (App. 60a-61a).

The names of the contributors who had given to the WCVP were not identified in the complaint. Contemporary newspaper articles leaked names of contributors "based on knowledgeable sources." Cary Segall & Andy Hall, *Big, Out of State Donors Weighed In For Court Case*, Wis. St. J., Mar. 19, 2000 (cited in *Jackson II*, 249 Wis. 2d at 690 n.6, 639 N.W.2d at 549 n.6). An April 20, 2000 newspaper article identified the contributors after bank records for WCVP were unsealed, but at this time, election law violations had not yet been proven. Cary Segall & Andy Hall, *Wilcox Backers Revealed, GOP School Choice Supporters Funded Secret Effort*, Wis. St. J., Apr. 20, 2000 (cited in *Jackson II*, 249 Wis. 2d at 690 n.6, 639 N.W.2d at 549 n.6).[6]

It was not until March 20, 2001 that the Elections Board civil action ended with a monetary settlement and a stip-

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[6] In its decision on sanctions, the majority, citing these newspaper accounts, seemed to suggest that this information should have triggered the motion. *Jackson II*, 249 Wis. 2d at 695, 639 N.W.2d at 551. Petitioner Garvey's later-submitted affidavit explained why they did not. "[R]egardless of what the press was saying . . . it was my opinion that until [the] investigation was completed and the results were known . . . it was not appropriate (or prudent) for any party to approach the Court to ask for relief . . . ." Garvey Aff. ¶ 7 (App. 51a).

ulation and order for dismissal. As part of the settlement, Justice Wilcox's campaign manager, Mark Block, agreed to pay $15,000 and admitted that "I and others violated state campaign finance laws in connection with the spring 1997 election of Justice Jon Wilcox to the Wisconsin Supreme Court . . . . *I recognize that my conduct has undermined public confidence in the integrity of the state electoral process.*" March 2001 Statement of Mark J. Block (emphasis added, attached to Milligan Aff.) (App. 34a). In a statement filed with the stipulation, Justice Wilcox acknowledged his responsibility for the activities of his campaign staff, and chose not to contest the Elections Board's suit:

> Last March [2000] the State Elections Board stated that it was the sense of the Board that I did nothing illegal and was not personally responsible for any illegal activities of my campaign. However, the Board's investigation has implicated my campaign manager and others in violations of the state's campaign finance law. I choose not to contest this. I acknowledge that I had a responsibility for the conduct of campaign staff. Therefore, as the candidate, I am funding my campaign committee [in the amount of $10,000] so that the committee can pay a monetary penalty to settle this matter.

March 2001 Statement of Jon P. Wilcox (attached to Milligan Aff.) (App. 40a).

C. The Motion To Vacate *Jackson I*

Based on Petitioner Garvey's review of the documents relating to the settlement of the Elections Board lawsuit (which had not become available to Petitioners until the middle of April 2001), and particularly the acknowledgment of Justice Wilcox in combination with the admissions of his campaign manager, on January 8, 2002, Petitioners filed a Motion to Vacate *Jackson I* and to rehear the case on the grounds that Justice Wilcox should not have participated in

the decision, *inter alia*, because of an "appearance of impropriety."[7] Petitioners' Motion to Vacate at 27. The motion stated that it was based on "new information recently received" which had "revealed that the decision was rendered by an improperly constituted panel because of the participation of [Justice Wilcox]." Petitioners' Motion to Vacate at 1.

Although *Jackson I* was decided 4-2 in favor of upholding the constitutionality of Wisconsin's "school choice" program, Wisconsin law is well-established that if a decision was rendered by a panel which included a justice who should have been disqualified, that decision is void whether or not there would have been sufficient votes to sustain the decision without that justice's participation. *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 179, 443 N.W.2d 662, 663 (1989).

The State of Wisconsin, represented by private counsel, opposed the motion and in its brief requested sanctions in the form of attorney's fees and costs. The State did not file a separate motion for sanctions: its opposition brief was entitled "Memorandum in Opposition to Motion to Vacate and Motion for Attorney Fees and Costs Pursuant to Wis. Stat. § 809.25(3)" and contained a one and a half page section arguing for attorney's fees. *See* January 23, 2002 Memorandum in Opposition to Motion to Vacate and Motion for Attorney Fees and Costs Pursuant to Wis. Stat. § 809.25(3) at 32-33.

Upon receiving the State's opposition memorandum, and because there was no separate notice and motion accompanying the State's request for sanctions, Petitioners contacted the clerk of the Wisconsin Supreme Court to ascertain

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[7] There is no statute of limitations in Wisconsin for bringing a motion to vacate a decision on grounds of judicial bias. *See generally* Wis. Stat. Sec. 806.07(2) (1999-2000).

the deadline for replying.[8] The clerk informed Petitioners that they would not have an opportunity to reply. The clerk stated that, if the court wanted a reply, it would inform Petitioners and provide a deadline. *See* Milligan Aff., ¶¶ 5-6 (also submitted with Petitioners' Motion for Reconsideration) (App. 28a). However, the court did not provide Petitioners with any such opportunity to respond, and thus no response to the State's request for sanctions was made prior to the Court's February 19, 2002 order granting sanctions.[9]

D. The Wisconsin Supreme Court's Denial Of The Motion To Vacate And Grant Of Sanctions Against Petitioners

On February 19, 2002, the Wisconsin Supreme Court denied the Motion to Vacate (in part I) and granted sanctions against all Petitioners (in part II). The court did not address the underlying merits of the motion, but rather based its denial *solely* on its "tardiness." It further held that the motion was "frivolous," reasoning as follows: "[Petitioners'] inordinate and *unexplained*[10] delay in raising the disqualification

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[8] Federal Rule of Appellate Procedure 38 was promulgated to avoid this very kind of uncertainty. *See* note 16, *infra*.

[9] Petitioners did file a two-page "supplementation" to their motion on February 4, 2002. This supplemental filing, however, by its terms and content, was not a "response" to the State's request for sanctions (as the State contended in its reply to the Motion for Reconsideration), nor was it intended to be. Instead, it presented new information which had become known to Petitioners after they had filed their motion.

[10] Petitioner Garvey later *explained* the timing of the Motion to Vacate in his March 11, 2002 affidavit in support of Petitioners' Motion for Reconsideration:

> Regardless of what I may have suspected prior to my review of these settlement documents—indeed regardless of what the press was saying—as I knew that there was in fact an ongoing investigation, it was my opinion that until that investigation was completed and the results were known—particularly as I knew that

issue in a timely fashion constitutes a waiver of whatever objections they may have had in this regard and lead us to the conclusion that the motion to vacate is frivolous." *Jackson II*, 249 Wis. 2d at 686-87, 639 N.W.2d at 547-48 (emphasis added). In part II of its decision, the court found that the motion was filed in bad faith and for an improper purpose, reasoning as follows:

> We conclude that the motion to vacate, coming as it did almost two years after the public disclosure of the information pertinent to the [Petitioners'] claims and shortly before oral argument in the United States Supreme Court [in the *Zelman* case], was filed in bad faith, for improper purpose, to undermine the public's confidence in the legitimacy of this court's decision and the integrity of this court as an institution.

Id. at 697, 639 N.W.2d at 552-53. The court added that Petitioners' "inordinate delay in filing the motion mocks the fundamental and vital principle of finality, which is essential to the operation of a society governed by law." *Id.* at 695, 639 N.W.2d at 551.

The court remanded the case to the circuit court for "a determination of the amount of reasonable attorney fees and costs." *Id.* at 697, 639 N.W.2d at 553. The order granting sanctions did not permit Petitioners any opportunity to

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> Justice Wilcox himself had participated in the investigation—it was not appropriate (or prudent) for any party to approach the Court to ask for relief resulting from Justice Wilcox's participation in the *Jackson* case. Justice Wilcox, after all, was entitled to his day in court.

Garvey Aff. ¶ 7 (App. 51a). Petitioner Garvey's explanation was not considered by the Wisconsin Supreme Court. It made no findings of fact relating to his explanation, or any of the other facts attested to in the Garvey Affidavit or other submissions filed with the Motion for Reconsideration, and there was no hearing to determine the weight or relevance of such facts.

respond to its "findings," nor did it direct the circuit court to conduct a fact-finding hearing to determine whether such "findings" had any factual basis. *Id.*

The Chief Justice dissented from the sanctions order, without opinion other than to state "[t]his proceeding ought to end now." *Id.* at 697-98, 639 N.W.2d at 553.

On the basis of the majority decision, the Wisconsin Supreme Court's disciplinary board (the Office of Lawyer Regulation) commenced a disciplinary investigation of the lawyer Petitioners.

E. The Motion For Reconsideration, The Wisconsin Supreme Court's Denial Of That Motion, And The Chief Justice's Dissent

On March 11, 2002, Petitioners filed a Motion to Reconsider the court's sanctions order on the grounds, *inter alia*, that by sanctioning them based on the inference that the Motion to Vacate was brought "in bad faith for improper purpose" the court had violated their Fourteenth Amendment rights to procedural due process and their First Amendment rights to petition the court for a redress of grievances. In the alternative, Petitioners requested that the court remand the case to the trial court so that they could be heard and present evidence to explain their "tardiness" and refute the inference that the Motion to Vacate was brought "in bad faith for improper purpose." Accompanying the Motion for Reconsideration were extensive, responsive, sworn factual proffers from Petitioners, including an Affidavit from Petitioner Edward Garvey, which directly responded to the court's holdings concerning the merits and timing of the Motion to Vacate and directly joined issue with the court's "findings" as to Petitioners' purpose, motivation and intent. (App. 69a-79a).

On July 9, 2002, the Wisconsin Supreme Court denied the Motion for Reconsideration in a six-paragraph order. *Jack-*

son III, 647 N.W.2d at 816-17. What was once a four-justice majority was now three, as an additional justice had decided not to further participate. The order denying the motion did not address any of the factual showings proffered in support of the motion. Rather, it summarily denied the motion and remanded the case for the limited purpose of determining reasonable attorneys fees. *Id.* at 816-17. The questions raised in the Motion to Reconsider were begged: "We have searched for any case involving a finding of frivolousness in which attorney fees and costs were not awarded. We have found none." *Id.* at 817. The majority did not respond to Petitioners' First or Fourteenth Amendment challenges to the sanctions order.

Wisconsin's Chief Justice did respond, however. Ironically, she stated that the court's own "declaration of frivolousness and the imposition of sanctions in this case undermines confidence in the legitimacy of this court's decision-making process and the integrity of this court as an institution." *Id.* at 818. Of particular concern to her was the fact that the majority failed "to make findings or present any reasoning or justification for its finding of frivolousness or the imposition of sanctions." *Id.* The Chief Justice expressly noted the lack of due process afforded to Petitioners:

> And should not the parties have been given an opportunity to present arguments on the legal question of the applicability of [the statute authorizing sanctions] and to be accorded a hearing and present testimony and argument on the factual bases for the imposition of sanctions under [that statute]? The answer to these questions is clearly yes. But the court failed to take any such action.

Id. at 820. And she criticized the majority's "timing inference" (*i.e.*, the inference drawn from the temporal

relationship between the Motion to Vacate and the prospective argument in *Zelman*) *as a matter of law*:

> Is the timing of these events coincidental? Does it matter? Lawyers frequently attempt to undermine cases that are not in their favor. They ask courts to distinguish, limit, vacate, or overrule prior cases. And this court has distinguished, limited, vacated, or overruled cases or has refused to do so. That is the common law process.[11]

Id. at 821.

The Chief Justice also expressly recognized the inextricable interrelationship between Petitioners' First Amendment right to petition and a determination that the petition was "frivolous":

> [A] determination of frivolousness is "an especially delicate area; a court must be cautious in declaring an action frivolous." This court must give the public wide berth to exercise its constitutional right "to petition the government for the redress of grievances."

Id. at 821. Wisconsin's Chief Justice concluded with a statement that rings particularly true following this Court's *White* decision:

> Anyone challenging a decision of this court, the impartiality of a justice, or the integrity of this institution must receive a full, fair, and impartial hearing, without even a hint of recrimination, retribution, or retaliation.

Id. at 822.

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[11] The Wisconsin Supreme Court's decision sanctioning Petitioners did not issue until July 9, 2002, after this Court's 5-4 decision in *Zelman*. Had *Zelman* gone the other way, of course, the *Jackson* case would have been rendered "non-final" as a matter of law. In any event, the court's reliance on the "fundamental and vital principle of finality" was, at best, problematic in the context of this case, ironically *because Zelman* was pending.

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate in this case for two independent but interrelated reasons:

1) To restore to Petitioners their full rights to petition.

Because of the vital public interest in preserving the public perception of the integrity of the judicial system, an elected court faced with a legitimate, or even colorable, challenge to the integrity of one of its decisions should take pains to address and fairly resolve the merits of that challenge. *See* Supreme Court's Rule 10(c). In this case, the Wisconsin Supreme Court did not even attempt a reasoned rejection of Petitioners' challenge. Instead, Petitioners were sanctioned based on a legally questionable—and, had they been given the opportunity to be heard, rebuttable—"inference."

In order to preserve the public's continued confidence in an impartial judiciary and to restore Petitioners' right to petition, this Court should grant certiorari and hold that a court may not sanction a party petitioning a court on a claim of judicial partiality without first finding that the petition was objectively meritless.

2) To afford Petitioners Edward R. Garvey and the law firm of Garvey & Stoddard, S.C., their full rights to Due Process of Law.

The Wisconsin Supreme Court's sanctions order is contrary to the decisions of virtually every federal circuit court which has addressed the question of sanctions. *See* Supreme Court Rule 10(b) and (c). Courts addressing the sanctioning of an attorney have almost universally demanded that any party or lawyer potentially subject to sanctions be granted certain procedural due process protections. The sanctions order in this case denied Petitioners Due Process of Law.

In order to afford Petitioners' right to Due Process of Law, this Court should grant certiorari and hold that a

court may not sanction a litigant or his or her attorney on grounds related to their purposes, motives or intents without first affording them the right to be heard on those charges in front of an impartial tribunal.

ARGUMENT

I. THE FIRST AMENDMENT RIGHT TO PETITION SHOULD BE CONSTRUED TO GUARANTEE THAT A PARTY ASSERTING A COLORABLE CLAIM OF JUDICIAL DISQUALIFICATION CANNOT BE SANCTIONED UNLESS THAT CLAIM IS FIRST FOUND TO BE OBJECTIVELY MERITLESS.

A. In Certain Contexts, This Court Has Held Previously That Limitations May Not Be Placed On Access To Courts Merely Because Of The Subjective Motivations Of The Petitioning Party.

The First Amendment right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390 (2002). This right protects access to the courts, as well as the legislature. *Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609 (1972). This Court has previously recognized that this right cannot be subject to the threat of liability under certain federal statues (antitrust and labor) absent an initial determination that the petition was objectively baseless, or a "sham." [12] *See, e.g., E. R.R. Presidents Conference v. Noerr*

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[12] The Federal Circuit Courts of Appeal are split as to whether a court may sanction a party, *e.g.* under Fed. Rule Civ. P. 11, for bad faith regardless of the merits of the party's claim. *See* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 Ohio St. L.J. 665, 711-17 (2000) (discussing circuit court cases). Petitioners do not address those cases in this petition because it is the contention of Petitioners that, given the *kind* of petition they brought, constitutional principles under the First and Fourteenth Amendments qualify, if not

Motor Freight, Inc., 365 U.S. 127 (1961); *Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983). Under this line of authority, unless and until a petition is found to be "sham," the subjective motivations of the party are irrelevant.

In *Professional Real Estate Investors*, the Court set out a methodology to be used to balance the need to deter frivolous, or "sham," lawsuits against the need to preserve the right to petition:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. *Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.*

508 U.S. at 60 (emphasis added). By mandating a determination of the merits of a case *before* any analysis of the subjective motivations of a party, this Court has assured that *only* those lawsuits which cannot be deemed to be a proper exercise of the right to petition, *i.e.*, objectively meritless suits, are subject to the deterrent effect of sanctions (*e.g.*, in the form of antitrust liability or a claim of unfair labor practices).[13] Indeed, the Court has suggested that even *losing*

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outright trump, rules of ethics or civil procedure except insofar as those rules may help to define concepts of "frivolousness" or "bad motive."

[13] This Court has not addressed whether the protections manifest in the *Professional Real Estate Investors* methodology must be applied to a court's decision of whether to sanction a party for filing an allegedly frivolous lawsuit. Petitioners are not seeking to apply the broader protections of *Professional Real Estate Investors* to all cases. Instead, this petition only requests that the Court apply those protections to claims of

lawsuits should not be subject to such deterrence without a finding of objective meritlessness. "[T]he genuineness of a grievance does not turn on whether it succeeds." *BE & K Constr. Co.*, 122 S. Ct. at 2399.[14]

This Court should grant certiorari to confirm that Wisconsin's Chief Justice was right: this same analysis should apply where, as here, the petitioning party has brought a colorable challenge to judicial impartiality of a particular justice in a given case.

B. The Public Interest In An Impartial Judiciary Deserves Even Greater Protection Than The Private Interests Protected By Existing Authority.

In *Noerr* and its progeny, the petitioning parties were seeking judicial intervention to protect their commercial or competitive status.[15] In those decisions, the Court recognized that, even though the petitioners obviously had a self-interest in protecting their commercial and competitive status, the existence of such interests should not undermine their constitutional right to petition. Indeed, the Court held that a desire to obtain personal advantage was likely present in *any* petition to the government and it would be improper to "deprive the people of their right to petition in the very

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judicial disqualification, where there is a uniquely important public interest.

[14] Petitioners do not here, nor did they in the Motion For Reconsideration, request a rehearing of the denial of their Motion To Vacate. That, of course, is a far different question than the question of whether the Motion To Vacate was frivolous.

[15] For example, in *Noerr*, a trucking company was seeking judicial intervention to preclude a competitor (the railroads) from passing certain legislation detrimental to them. 365 U.S. at 129-30. Similarly, in *Professional Real Estate Investors*, movie studios had petitioned the court to preclude a hotel chain from copyright infringement. 508 U.S. at 52-53.

instances in which that right may be of the most importance to them." *Noerr*, 365 U.S. at 139.

If the protection afforded by the "objectively meritless" standard is appropriate where the party's interest is "private," *a fortiori*, it protects a party challenging the partiality of a court in rendering against it in a decision of vital public importance. Such a party not only has its own "private" constitutional right to due process to assert, it also inherently asserts the public's right to, and interest in, such an impartial decisionmaker. Here, in particular, the public has a strong interest in fostering meritorious petitions. *Cf. Noerr*, 365 U.S. at 139 (identifying the importance of "the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws").

Certiorari is appropriate in this case to assure that the right to petition a court on a claim of judicial partiality is granted at least the same protections provided to parties seeking to petition a court to preserve or protect their wholly private interests.

C. The Wisconsin Supreme Court's Sanctions Order Was An Unconstitutional Infringement On Petitioners' First Amendment Right To Petition And Has Also Sent the Wrong Message to the Citizens of Wisconsin.

By sanctioning Petitioners without conducting any objective analysis of the merits of their Motion to Vacate, the Wisconsin Supreme Court has "sent the message" that it may well wield the heavy sword of sanctions against both the lawyer and his client *regardless* of the merits of any challenge to judicial partiality. Wisconsin's Chief Justice recognized that this was the *wrong* message in her powerful dissent:

> If we are to protect the integrity of the judiciary, this court must ensure that it remains an institution that is

> open and accessible. It must not succumb to the temptation to silence challengers by attacking them personally or by diverting attention away from the merits of a challenge. Anyone challenging a decision of this court, the impartiality of a justice, or the integrity of this institution must receive a full, fair, and impartial hearing, without even a hint of recrimination, retribution, or retaliation. *That is the message the court should be sending.*

Jackson III, 647 N.W.2d at 822 (emphasis added). Of particular concern to her was the effect of that "message" on the public:

> The court must be big enough in stature, strong enough in spirit, and gracious enough in action to respond fairly and fully on the merits to any challenge to its integrity, and then without vengeance or even the appearance of vengeance move on to our other business. The people of this state deserve no less.

Id.

As a logical and necessary extension of its prior decisions concerning a party's First Amendment right to petition the government, this Court should grant certiorari in order to confirm that a court cannot sanction a party asserting a claim of judicial partiality unless and until the court first determines that the action is objectively meritless.

II. THE WISCONSIN SUPREME COURT'S SANCTIONS ORDER VIOLATED PETITIONER EDWARD R. GARVEY AND PETITIONER GARVEY & STODDARD, S.C.'S RIGHT TO DUE PROCESS.

A. This Court Has Found That An Attorney Must Be Afforded Procedural Due Process Prior To The Imposition Of Sanctions.

This Court has held that sanctions must not be imposed without a prior opportunity to be heard. *Roadway Express,*

Inc. v. Piper, 447 U.S. 752, 767 (1980). Specifically, this Court has stated that, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.* at 764. Although this Court has recognized a court's inherent powers to sanction an attorney for misconduct, it has acknowledged that such powers should not be carelessly wielded. *Id.* ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.") (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("A court must, of course, exercise caution in invoking its inherent power, and *it must comply with the mandates of due process*, both in determining that the requisite bad faith exists and in assessing fees.") (emphasis added).

B. The Federal Circuit Courts Of Appeal Uniformly Require That An Attorney Be Afforded Procedural Due Process Prior To The Imposition Of Sanctions Based On Allegations Of Bad Faith Or Improper Purpose.

The Wisconsin Supreme Court's order is in direct conflict with the decisions of federal courts of appeal on the issue of whether a court is required to afford an attorney procedural due process before imposing sanctions based on charges of bad faith or improper purpose.

The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Federal Circuits have all held that an attorney is entitled to an opportunity to be heard before a court may impose sanctions based on such charges. *See e.g., Mickle v. Morin*, 297 F.3d 114 (2d Cir. 2002); *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175 (3d Cir. 2002); *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281 (5th Cir. 1991); *Ray A. Scharer & Co. v. Plabell Rubber Prods., Inc.*, 858 F.2d 317 (6th Cir. 1988); *United*

States v. 1948 S. Martin Luther King Drive, 270 F.3d 1102 (7th Cir. 2001); *In re Clark*, 223 F.3d 859 (8th Cir. 2000); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1982); *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987); *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002); *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 899 F.2d 1171 (Fed. Cir. 1990).

Those cases which have permitted appellate sanctions without providing an opportunity to be heard have not depended upon the inherently factual issues of motive, purpose, and intent. For example, in *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987), the Seventh Circuit found that notice and a hearing were *not* required under Fed. R. App. P. 38, as the attorney's mental state was not at issue and there were no factual issues to resolve. *Id* at 1201-02. In *Romala Corp. v. United States*, 927 F.2d 1219 (Fed. Cir. 1991), the Federal Circuit also found that a party was not entitled to specific notice and an opportunity to explain its actions under Rule 38, as "no possible explanation could justify" misstatements in that party's briefs. *Id.* at 1226-27.

Here, Petitioners' motives and intent were not merely *an* issue supporting the court's finding of frivolousness, they were the *sole* basis for that finding. Further, as shown in the affidavits submitted by Petitioners in support of their Motion for Reconsideration, the inference of bad faith and improper purpose which the court drew against Petitioners was directly rebutted. *See supra* note 10. At a minimum, Petitioners were entitled to a fair hearing on their proffers.[16]

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[16] To protect against the possibility of an arbitrary imposition of sanctions, Rule of Appellate Procedure 38 was amended to expressly require that an appeal not be deemed frivolous absent "a separately filed motion or notice from the court *and* reasonable opportunity to respond" (emphasis added). The rule further requires that, regardless of whether or not the notice was adequate, *it is up to the court* to provide the opportunity

The need for procedural due process protections at the appellate level are heightened because of the nature of appellate review and because often the appellate court issuing the sanctions is the court of last resort. As the Chief Justice of the Wisconsin Supreme Court stated in her dissent: "Keeping this court open to people who are challenging a decision of this court on the basis of a justice's alleged bias is especially critical, *because this court is the only venue where a party can make this kind of challenge*." *Jackson III*, 647 N.W.2d at 822 (emphasis added).

Due Process of Law was denied Petitioners. As a consequence, their reputations have been sullied and they have been ordered to pay substantial attorney's fees. They are being investigated for ethical violations. They seek relief from this Court. They have no other recourse.[17]

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to be heard. As the Advisory Committee Notes to this Rule explain (emphasis added):

> The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express* . . . that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. . . . *Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court.*

Here, of course, the state's "motion" (and brief) was precisely the type of inadequate notice that this amendment was directed at.

[17] Only this Court has authority to review a state court decision that is "judicial" in nature. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Although this Court has not formally resolved the question, the federal circuit courts have repeatedly held that a decision disciplining a party is "judicial." *See, e.g., Patmon v. Mich. Supreme Court*, 224 F.3d 504 (6th Cir. 2000) (precluding challenge against attorney discipline

CONCLUSION

It is difficult enough for a lawyer to bring a motion attacking the impartiality of a sitting justice in a high profile case. Some lawyers—for obvious business reasons—simply will not bring such a motion regardless of its merit. And if the sanctions order in this case is permitted to stand on this record, there will likely be fewer lawyers in Wisconsin willing to take such a risk. This Court, of course—like the Wisconsin court—does not want to encourage meritless disqualification motions. Such motions are not "in the public interest," nor do Petitioners contend that they are. But lawyers, too, have a vital role to play in the administration of justice, and it *is* in the public interest to permit them to perform that role. The System has no other means available.

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process based upon due process grounds); *Levin v. Attorney Registration & Disciplinary Comm'n of the Supreme Court of Ill.*, 74 F.3d 763 (7th Cir. 1996) (same).

This Court should grant certiorari in order to strike the required constitutional balance between the important and "delicate" interests at stake in this case and others to follow.

Respectfully submitted,

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